No. 97-55

(H)

MOTION FILED AUG 7. 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF OKLAHOMA CITIZENS FOR A SOUND ECONOMY *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION BY OKLAHOMA CITIZENS FOR A SOUND ECONOMY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Oklahoma Citizens for a Sound Economy respectfully move for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

Oklahoma Citizens for a Sound Economy ("Oklahoma CSE") is a public policy think-tank supporting free market

principles in economic issues. With a 7,000 member base in Oklahoma, Oklahoma CSE advocates less taxation, less government spending and less government regulation in support of consumers' rights to greater product quality at a lower price. It is through competition, not protection, which consumers truly benefit in the market place.

Our interest in *Keating v. State of Oklahoma, ex rel, Oklahoma Tax Commission* is the economic well being of non-residents being taxed at a rate that exceeds the income actually earned in this State. It is our belief that taxing non-residents at a higher rate has a deleterious effect in the attraction and permanent location of individuals to Oklahoma.

This case is of great concern to the *amicus curiae*.

Accordingly, Oklahoma CSE moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS

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Date: August 7, 1997

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QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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BRIEF OF OKLAHOMA CITIZENS FOR A SOUND ECONOMY *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

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[1] Counsel of Record for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the Oklahoma and United States Constitutions. Petitioners'

federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate, Section 2362 indirectly taxes the extraterritorial income of nonresidents, deriving the tax from sources outside of Oklahoma. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), and *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals relied upon and extended the *Maxwell* holding to uphold under the federal Constitution Petitioners' challenges to Section 2362.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the U.S. Constitution by extending the *Maxwell* holding. *Maxwell* specifically addressed a New Jersey progressive estate "death" tax. *Maxwell* did not address a state income taxation scheme. Each

court, *supra*, relied on *Maxwell* to uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction. The result—a higher tax rate and a larger tax derived from sources outside of Oklahoma.

The Petitioners herein are merely the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, Supreme Court Practice 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982)). By relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable—income to determine the tax rate in a progressive income taxation scheme, each court referenced, *supra*, decided an important and substantial federal question arising under the federal Constitution that was not

resolved by *Maxwell*. Moreover, to date, the issue raised by the Petition, has not been resolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari in order to resolve the specific federal question raised by the Petition, the source of ongoing controversy and litigation. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963).

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Justice Douglas observed that "[t]he place of *stare decisis* in constitutional law is even more tenuous" and "[s]o far as constitutional law is concerned stare decisis must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the federal constitutional challenges to the statute, including Due Process.

The majority employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here regulated** is a *privilege to succeed to property* ***which is within the jurisdiction*** *of the State.*
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The

> transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the Court, including Justice Holmes, applied an **economic realities and practical operation** approach. The economic reality was an unconstitutional deprivation of property without due process.

Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, our Congress recently enacted, and the President signed, one of the most comprehensive tax reform legislation packages in recent history! This Court has since rejected the antiquated formalism utilized by the *Maxwell* majority. *See, e.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining**

> **the constitutional significance of the exaction.** 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect.**' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

Maxwell has been called into question by this Court and members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (noting that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (discussing the application of the *Maxwell* holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

A jurisdiction, such as Oklahoma, may tax all the income *of its* ***residents***, even income earned outside the taxing jurisdiction. As to the income of **nonresidents**, however, a taxing jurisdiction such as Oklahoma is much more restricted in its power to tax and must tax only the income derived from sources within the borders of the State:

> "**For nonresidents**, in contrast, jurisdictions generally may tax **only income earned within the jurisdiction**. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; as to nonresidents, '*the tax is only on such income* as is **derived from . . . sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Because the issue raised in the Petition is a constitutional question and the practical operation and economic reality of Section 2362 is an indirect income tax derived from sources of income beyond the borders of Oklahoma, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to distinguish, modify or simply overrule *Maxwell* to fit today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly"). In the case at bar, the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of this Court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

For example, the *Maxwell* decision addressed a progressive state **privilege death** tax, not a progressive state **income** tax, *Chickasaw Nation,* this Court clearly articulated the limitation of a State's taxing power in relation to a nonresident's income. The Court stated:

> "**For nonresidents**, in contrast, jurisdictions generally may tax **only income earned *within the jurisdiction***.

> See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is **derived from . . . sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By relying on *Maxwell* to uphold Oklahoma's exertion of its taxing power to indirectly tax nonresidents' income derived from sources beyond the borders of the State, the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of footnote No. 11 in *Chickasaw Nation*.

Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which provides exports with immunity from state taxation. As in the decision below the Ohio Supreme Court had interpreted a federal constitutional provision in conjunction with the State tax laws. This Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution" and granted certiorari.

The issue raised in the Petition is whether the State of Oklahoma's inclusion of nonresident's extraterritorial income having no nexus to the State in the calculation of the nonresident's Oklahoma income tax liability offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

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